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No. 84-854

In the Supreme Court of the United States

OCTOBER TERM, 1984

ECOS ELECTRONICS CORPORATION,
Petitioner

vs.

UNDERWRITERS LABORATORIES, INC.,
Respondent

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PETITIONER'S REPLY BRIEF

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ECOS ELECTRONICS CORPORATION

Petitioner,

v.

UNDERWRITERS LABORATORIES, INC.,

Respondent.

On Petition For a Writ of Certiorari
To The United States Court of Appeals
For The Seventh Circuit

PETITIONER'S REPLY BRIEF

As UL correctly notes in its Brief in Opposition, the District Court and the Court of Appeals for the Seventh Circuit dismissed plaintiff's complaint on the ground that plaintiff had failed to allege an unreasonable restraint of trade and therefore plaintiff had failed to state a claim under the antitrust laws (UL br., 3).

Thus, the central issue in this appeal is whether, on the face of the complaint, plaintiff has alleged an unreasonable restraint of trade.

Plaintiff respectfully submits that UL's Brief in Opposition repeats the clear errors of the Seventh Circuit and the District Court. UL goes into great detail about the good purposes of UL* (UL br., pp. 4-8 and 12-13); however, UL conveniently glosses over the real issue: the effect of UL's conduct on competition in the relevant market.

Plaintiff's complaint clearly alleges that UL's manipulation of the standard and Listing process has reduced competition in the relevant market for outlet circuit testers. Plaintiff charged (A-86, ¶ 58(p)):

> UL Listed Woodhead-type testers have been, and will continue to be, given an unfair competitive advantage over the more superior

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* None of this self congratulation is supported by citations to the complaint, and, plaintiff respectfully submits, is wholly irrelevant. The only issue is whether the particular conspiracy described in the complaint resulted in an unreasonable restraint of trade.

> and technically advanced testers like those manufactured by plaintiff; potential purchasers will tend to reject a tester which is more advanced than the Woodhead-type tester based on UL's fraudulent requirements which indicate that the level of performance of the Woodhead-type tester is all that is required for safety (as alleged in paragraph 21 herein); as a further consequence, the development of technically and functionally superior testers has been and will continue to be impeded.

As this Court noted almost thirty years ago in Conley v. Gibson, 355 U.S. 41, 48 (1957):

> [T]he Federal Rules of Civil Procedure do not require a claimant to set out in detail the facts upon which he bases his claim. To the contrary, all the Rules require is "a short and plain statement of the claim" that will give the defendant fair notice of what the plaintiff's claim is and the grounds upon which it rests. * * * Such simplified "notice pleading" is made possible by the liberal opportunity for discovery and the other pretrial procedures established by the Rules to disclose more precisely the basis of both claim and defense and to define more narrowly the disputed facts and issues.

Thus, if UL believes that its conduct has not resulted in a reduction of competition, it should have submitted evidence to that effect in support of its motion for summary judgment. The burden would then

be on plaintiff to substantiate its allegations. Adickes v. S.H. Kress & Company, 398 U.S. 144 (1970).

While UL submitted voluminous evidence to the District Court purporting to demonstrate the falseness of certain of plaintiff's allegations, UL did not submit a single affidavit, document, deposition, or any other evidence which in any way purported to contradict the allegation that UL's fraudulent Listing of theproducts of plaintiff's competitors resulted in a reduction of competition in the relevant market.

Plaintiff submits that its allegations of reduced competition are sufficiently plain that UL has fair notice of the nature of plaintiff's claim. This is all that is required of plaintiff at this stage of the proceedings.

Plaintiff has alleged, and stands ready to prove at trial, that UL's conspiracy to manipulate its standards and Listing by approving products it knew were dangerous has effectively excluded from the market products with a different level of performance than the least expensive product Listed by UL (i.e. products

which do what they purport to do and which are not dangerous), including plaintiff's products Plaintiff alleged (A-69, ¶ 21):

> UL's Standards and its Product Listing Service have two substantial effects in a market:
> (a) Any product which does not have a UL Listing or which cannot meet the specifications of a UL Standard risks market rejection as "unsafe". * * *
>
> (b) * * * Any product which exceeds the UL requirements and is thus more expensive than products which barely meet UL's requirements will also tend to be rejected as containing frivolous, unnecessary and unduly expensive features.*

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* Plaintiff submits that UL has such an enormous impact on the relevant market in this case as a result of the peculiar economic factors which influence a market for safety products such as outlet circuit testers. Potential purchasers are interested in safety products primarily to insure that they exercise "due care", and are thus protected from liability in the event of an injury. Compliance with standards promulgated by a nationally recognized organization such as UL or use of a product Listed by UL is generally accepted as sufficient to satisfy the requirement of due care. Purchasers are not interested in whether a product actually works. Rather, they are interested solely in whether it has been approved. Thus, if UL, in conspiracy with one or more manufacturers, lists a product, competing products simply will not be able to compete, even if, as plaintiff alleges herein, the listed product does not work.

In the face of these clear allegations of an unreasonable restraint of trade, dismissal of plaintiff's complaint can only be affirmed if, as a matter of law, the promulgation of a fraudulent standard and the Listing of products known to be defective cannot constitute an unreasonable restraint of trade under the Sherman Act.

The Court of Appeals for the Seventh Circuit apparently reached precisely this conclusion (A-9). The panel held without any support in the record and in direct contradiction to plaintiff's unchallenged allegation, that standards and listings "eliminat[e] market imperfections by providing information to consumers."

As plaintiff* argued at length in its petition (pp. 32-36), the panel's holding that standards, as a matter of law, eliminate market imperfections and cannot violate

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* Plaintiff has no parent companies, subsidiaries, or affiliates.

the antitrust laws, effectively overrules the Court's opinions in Radiant Burners v. Peoples Gas, Light & Coke Company, 364 U.S. 656 (1961) and American Society of Mechanical Engineers, Inc. v. Hydrolevel Corporation, 456 U.S. 556 (1982). In each of these cases the Court held that standards can unreasonably restrain competition in violation of the Sherman Act.

UL's brief in opposition (UL br., pp. 14-16) lamely repeats its earlier assertion that Radiant Burners and Hydrolevel do not apply, as plaintiff does not allege any exclusionary conduct. As is set forth above, plaintiff has very clearly alleged that UL's conspiracy with plaintiff's competitors has excluded plaintiff and any other manufacturer which seeks to compete in the relevant market by offering a higher quality product.

In summary, plaintiff submits that this Court should grant certiorari in the instant case in order to correct the Court of Appeals' opinion which effectively nullifies the cases of Hydrolevel and Radiant Burners.

Respectfully submitted,

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